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|  |             |                      | HARDELL, JOHN R     |                  |
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* MARIE S. CHAN, STEVEN E. BROWN, PATRICK D. MOORE,  
J. MICHAEL METCALF, MICHAEL A. VALENTI,  
and MICHAEL J. McDONALD

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Appeal 2009-014762  
Application 10/783,729  
Technology Center 1700

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Before TERRY J. OWENS, TONI R. SCHEINER, and MARK NAGUMO,  
*Administrative Patent Judges.*

SCHEINER, *Administrative Patent Judge.*

DECISION ON APPEAL<sup>1</sup>

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<sup>1</sup> The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

This is an appeal under 35 U.S.C. § 134 from the final rejection of claims 1-5, 8-12, 18, 31, 34, 37, and 39-42, rejected on the grounds of obviousness. We have jurisdiction under 35 U.S.C. § 6(b).

#### STATEMENT OF THE CASE

Claim 1 is representative of the subject matter on appeal:

1. A liquid cleaning composition for a textile substrate consisting of:
  - a) from about 2.0 to about 75 parts by weight of at least one absorbent particulate, said absorbent particulate being selected from the group consisting of a urea formaldehyde polymeric material, polyurethane, cellulosic particles, and mixtures thereof, wherein said absorbent particulate has an average particle size of from about 10 to about 300 microns in diameter and an oil absorption value of at least 40;
  - b) at least 35 parts water, wherein said water contains a surfactant sufficient to provide a surface tension of less than about 40 dynes per centimeter;
  - c) from about 0.01 to about 50 parts by weight of a dispersion stabilizing agent selected from the group consisting of cellulosic polymers, clay compounds, xanthan gums, and mixtures thereof, wherein said dispersion stabilizing agent is present in an amount sufficient to produce a stable or easily redispersed dispersion; and
  - d) at least one compound selected from the group consisting of a pH adjuster, a biocide, and a fragrance.

The claims stand rejected as follows:

- (A) Claims 1-5, 8-12, 18, 31, 34, 39, and 40 under 35 U.S.C. § 103(a) as unpatentable over Trinh.<sup>2</sup>

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<sup>2</sup> US 4,481,126, issued November 6, 1984 to Trinh et al.

- (B) Claims 37, 41, and 42 under 35 U.S.C. § 103(a) as unpatentable over Trinh, Froehlich I,<sup>3</sup> and Brown.<sup>4</sup>
- (C) Claims 1-5, 8-12, 18, 31, 39, and 40 under 35 U.S.C. § 103(a) as unpatentable over Froehlich II<sup>5</sup> and Chapman.<sup>6</sup>
- (D) Claims 37, 41, and 42 under 35 U.S.C. § 103(a) as unpatentable over Froehlich II, Froehlich I, and Brown.

#### REJECTION (A)

The Examiner rejected claims 1-5, 8-12, 18, 31, 34, 39, and 40 as unpatentable over Trinh. Trinh describes a “liquid cleaner . . . composition of up to 30% polymeric solids, up to 95% liquid carrier and an effective amount of a suspension aid” (Trinh, col. 1, ll. 60-62). The Examiner’s fact findings with respect to the specific components of Trinh’s compositions are set forth on pages 3-5 of the Examiner’s Answer.

The Examiner’s findings are undisputed, with the following exceptions: Appellants contend that

Trinh teaches the use of silicone materials in their cleaning composition to enhance the appearance of car surfaces, improve the ease of application and removal of the cleaner and to make the car surfaces water repellent . . . Trinh specifically exemplifies the use of 4% by weight of silicone in each of Examples I through XVI. Trinh also claims the use of silicone in claims 1 and in claims 31-33.

(App. Br. 6.)

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<sup>3</sup> US 3,910,848, issued October 7, 1975 to Froehlich et al. (“Froehlich I”).

<sup>4</sup> US 5,514,302, issued May 7, 1996 to Brown.

<sup>5</sup> US 4,013,594, issued March 22, 1977 to Froehlich et al. (“Froehlich II”).

<sup>6</sup> US 4,493,781, issued January 15, 1985 to Chapman et al.

Appellants contend “[a]s a result of such teachings by Trinh, . . . silicone is a required component of Trinh’s composition” (App. Br. 8).

Appellants’ argument is not persuasive. While it’s true that the claims on appeal use the transitional term “consisting of,” and therefore exclude silicone as a component of the claimed composition, the Examiner correctly points out that Trinh explicitly describes silicone as “a preferred optional component” of its compositions (Trinh, col. 5, ll. 67-68; Ans. 9). “Optional” is the direct opposite of “required.” We agree with the Examiner’s conclusion that “[a] preferred ingredient is nonetheless optional, so it is obvious to omit it” from the composition (Ans. 9).

That being the case, evidence provided by the Metcalf Declaration<sup>7</sup> to the effect that Trinh’s silicone-containing cleaning compositions “are not suitable for use as cleaning compositions for textile substrates” (App. Br. 8) is simply not relevant. Similarly, Appellants’ argument that “one of ordinary skill in the art would also need some motivation or suggestion by Trinh that the car cleaning composition would be acceptable for use on textile substrates” (*id.*) is irrelevant. The claims on appeal are directed to a composition, not to a method of cleaning textiles.

Appellants further contend that Trinh “fail[s] to provide a teaching or fair suggestion of a dispersion stabilizing agent selected from cellulosic polymers, clay compounds, xanthan gums, and mixtures thereof, . . . in an amount sufficient to produce a stable or easily redispersed dispersion” (*id.* at 9).

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<sup>7</sup> Declaration of Michael Metcalf, dated September 19, 2006, and submitted under the provisions of 37 C.F.R. § 1.132.

This argument is not persuasive. As the Examiner correctly points out, Trinh discloses compositions containing “[t]hickener suspending agents . . . includ[ing] . . . sodium carboxymethyl cellulose, hydroxyethyl cellulose, [and] gums, . . . used at effective levels of up to 10%” (Trinh col. 5, ll. 39-45; Ans. 4). Trinh explicitly teaches that these thickener suspending agents achieve or enhance “[t]he stability of the dispersion” (*id.* at col. 5, ll. 35-36).

The rejection of claims 1-5, 8-12, 18, 31, 34, 39, and 40 under 35 U.S.C. § 103(a) unpatentable over Trinh is affirmed.

#### REJECTION (B)

The Examiner rejected claims 37, 41, and 42 as unpatentable over Trinh, Froehlich I, and Brown.

Appellants make no specific arguments with respect to this rejection, but “rely on the discussion . . . with regard to the deficiencies of Trinh” and “assert that Froehlich [I] and Brown do not provide for the deficiencies of Trinh” (App. Br. 11).

The rejection of claims 37, 41, and 42 under 35 U.S.C. § 103(a) unpatentable over Trinh, Froehlich I, and Brown is affirmed for the reasons discussed above.

#### REJECTIONS (C) and (D)

Appellants filed an Appeal Brief on September 2, 2008. Rather than issuing an examiner’s answer and forwarding the application to the Board for a decision on appeal, the Examiner resumed prosecution and issued a non-final office action (dated October 17, 2008), maintaining rejections (A) and (B), discussed above, and entering two new obviousness rejections: (C) the rejection of claims 1-5, 8-12, 18, 31, 39, and 40 over Froehlich II and

Chapman, and (D) the rejection of claims 37, 41, and 42 over Froehlich II, Froehlich I, and Brown.

Appellants filed a second Appeal Brief on March 23, 2009, without addressing either of the new rejections. In their Reply Brief (July 27, 2009), Appellants explain that they did not respond to the new rejections because it was their “intent to merely re-instate the previously filed Appeal,” and also argue that the new rejections were improper because they “could have been made earlier by the Office” and “[t]here was no evidence . . . that the Examiner had received supervisory approval to re-open prosecution” (Reply Br. 4).

Nevertheless, jurisdiction of the Board over an appeal does not begin until a docket notice is mailed by the Board. 37 C.F.R. § 41.35(a). The action now complained of occurred while the application was under the jurisdiction of the Examiner. Any request for relief from an action (or inaction) of an examiner in the *ex parte* prosecution of an application is by way of petition to the Director under the provisions of 37 CFR §§ 1.181-1.183. Appellants had the opportunity to file a petition requesting relief under any of these provisions, but did not. Nor have Appellants identified any other avenue for relief that is within our authority or discretion.

To the extent Appellants now argue that rejections (C) and (D) are untenable because “the combination of references teach a powdered cleaning composition . . . which does not contain any dispersion stabilizing agent” (Reply Br. 5), we are not persuaded.

Froehlich II describes a “powdered” or “dry” carpet cleaning composition comprising 30-90% particulate polymeric urea-formaldehyde, which as the Examiner points out, nevertheless contains 10-70% fluid,

where “the cleaning fluid can be water containing sufficient surfactant to lower the surface tension to below 40 dynes per centimeter” (Froehlich II, col. 1, ll. 44-46, col. 2, ll. 44-46; Ans. 7). Similarly, Froehlich I describes a liquid cleaning composition containing particulate polymeric urea-formaldehyde, which further includes an “antisetling agent” (Froehlich I, col. 1, ll. 37-46). In any case, the Examiner has explained why one of ordinary skill in the art would have had reason to add clay (a dispersion stabilizing agent encompassed by the present claims) to Froehlich II’s composition, and Appellants have not identified any flaw in the Examiner’s rationale.

The rejection of claims 1-5, 8-12, 18, 31, 39, and 40 as unpatentable over Froehlich II and Chapman, and the rejection of claims 37, 41, and 42 as unpatentable over Froehlich II, Froehlich I, and Brown are affirmed.

#### TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

**AFFIRMED**

cdc

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